

Trustee not entitled to debtor's property discovered after final distribution (Dooneen Ltd (trading as McGinness Associates) and another v Mond)

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Restructuring & Insolvency analysis: **Iain Penman**, a director at **Lindsays**, examines the Supreme Court's decision that after the second respondent debtor had granted a protected trust deed for his creditors, the appellant trustee had made a final distribution when he distributed what he called a 'first and final dividend' to the creditors. When the second respondent subsequently received compensation for having been mis-sold payment protection insurance (PPI) before he entered into the trust deed, the appellant was not entitled to receive that compensation.

Dooneen Ltd (trading as McGinness Associates) and another v Mond [\[2018\] UKSC 54](#), [\[2018\] All ER \(D\) 127 \(Oct\)](#)

What are the practical implications of the judgment?

It is pleasing to note that the Supreme Court has upheld the decisions of the Court of Session—had it done otherwise—it would have introduced an intolerable level of uncertainty into the operation of trust deeds.

The practical impact of this decision is to make it clear that:

- the trustee is the arbiter of any dividend to creditors
- a final distribution does not have to comprise the entirety of the assets in the trust estate
- payment of the final distribution by the trustee provides a complete discharge to the trustor

Interestingly, the court has added a postscript commenting on the impact of the decision observing that:

'This is scarcely a satisfactory outcome. An asset which vested in the trustee for the benefit of the creditors and ought to have been applied to payment of the debts due to them, will instead be paid to the debtor, merely because the trust was administered in ignorance of its existence.'

and

'Prior to the hearing of the appeal, the court informed the parties that it would be assisted by discussion of the legal consequences of a mistake in this context—in particular, whether the relevant acts of the trustee might be reduced if they were the result of an error as to the extent of the trust estate. In posing that question, the court had it in mind that on the construction of the trust deed which it has now upheld, the acceding creditors effectively conferred on the trustee a power to extinguish their rights as against the debtor by determining that a dividend should be a final distribution, and that the determination in the present case had been made in ignorance of a relevant—indeed, critical—consideration. It also had it in mind that reduction is a discretionary remedy, which may be granted on terms, or withheld, where that is appropriate to protect the rights of third parties.'

Perhaps, therefore, in the future, one impact of this decision will mean that any similar incidents in Scotland will instead generate litigation against a trustee who was—or reasonably should have been—aware of vested but unrealised assets and proceeds to make a final distribution.

This decision is unlikely to have any significant implications as regards to English insolvency processes, as it relates entirely to Scots law.

What was the background?

In September 2006, the second respondent granted the protected trust deed for his creditors. The deed provided that the second respondent transferred to the appellant—as trustee for his creditors—his estate, comprising of his rights and assets. At a time of the appellant's choosing, he would, by way of interim or final dividends, distribute the estate—minus his remuneration and expenses in administering the trust—to the creditors. The trust deed would terminate on

the final distribution if it had not already terminated on an earlier award of sequestration or acceptance by the creditors of a composition.

In November 2010, the appellant paid the 'final dividend' of £22.41 and a fortnight later received his discharge.

In January 2015, the second respondent appointed the first respondent as his agent to pursue a claim for mis-selling of PPI, and they received compensation in April 2015.

The question then arose as to whether the appellant—rather than the respondent—was entitled to the compensation.

The respondents argued that although the second respondent's right to compensation formed part of the estate transferred to the appellant for the benefit of his creditors, his right to it ceased to be part of the trust when the appellant paid the 'final dividend' because at that point the trust—in accordance with the provisions concerning the final distribution—then came to an end.

The appellant maintained that there had not been a final distribution within the meaning of the trust deed since a distribution could not be final if—as a result of ignorance—it left part of the trust estate out of account.

The Lord Ordinary and the Inner House both found in favour of the respondents, then the appellant appealed to the Supreme Court.

What did the Supreme Court decide?

The Supreme Court held that the appellant's decision—taken under the present trust deed in accordance with his fiduciary duty—that a distribution was final had to be regarded as definitive, subject to the possibility of its being reduced or set aside. Therefore, the trust ended in November 2010, the second respondent was then discharged of his debts, and the appellant—discharged later that month—had no entitlement to the asset discovered in 2015.

The Supreme Court rejected the appellant's submission that a final distribution could only occur when either all assets were distributed, or enough assets were distributed to pay all creditors in full. The Supreme Court considered that such a construction would have consequences, which the second respondent could not have intended when he granted the deed. Given the possibility of discovering previously unknown assets, he could never be certain that any distribution was final, could never be certain that the trust had terminated, and that he had been discharged of his debts.

The Supreme Court's discussion of the position is extremely clear and easy to follow.

The trust deed provided composition between the debtor and the acceding creditors, with composition being conditional on the final distribution of the estate by the appellant. It was for the appellant—acting in accordance with his fiduciary duty towards the creditors—to determine when a final distribution should take place.

The contrary argument that a final distribution could only occur in the absence of full payment of the debts when all of the assets transferred to the appellant under the trust deed had in fact been distributed—whether or not the appellant was aware of their existence—was rejected as the Supreme Court considered this would have consequences which the debtor could not reasonably have intended.

This provides certainty to the debtor and creditors—as to have held otherwise would mean that no-one could ever be certain that any distribution was a final distribution and thus no-one could ever be certain that the trust had terminated.

Certainty of termination also ensures certainty of discharge for debtors. This means they have clarity that all the debts placed within the protected trust deed are no more. It also means that any party doing business with them post-termination can be clear as to their status.

Finally, the decision also provides certainty as to the accuracy of the Register of Insolvencies in which a person's discharge from a trust deed is recorded.

Interviewed by Robert Matthews.

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